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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reported opinions in the Sixth Circuit or in the District Court. The order filed in the Sixth Circuit upon the affirming of the Petitioner's conviction is quoted hereinafter in pertinent part and appears at (A. 8).

CONCISE STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS INVOKED

In his Petition for Writ of Certiorari Petitioner asserted that this Court has jurisdiction under Title 28, United States Code, Section 1254(1) and that this Court should

exercise its supervisory powers. Certiorari was granted on November 8, 1968 and Petitioner was given until December 27, 1968 to file his brief on the merits.

REGULATION INVOLVED

> The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> *Federal Rules of Criminal Procedure*, Rule 32(c)(1)

QUESTION PRESENTED

Whether a convicted defendant is entitled to a new trial where the presiding judge has read his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered "yes" in *Calland v. United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

CONCISE STATEMENT OF CASE

On May 31, 1967 Petitioner was tried before a jury in the United States District Court for the Eastern District of Kentucky for the offense of placing lives in jeopardy in robbing a postal substation and immediately after the jury returned its verdict of conviction the Court proceeded to disposition without any recess or pause. As the Court was about to impose sentence, defense counsel requested that a pre-sentence investigation be conducted.

> Mr. Richards: Your Honor, I would like to ask that a pre-sentence investigation be made of

> By the Court: (Interrupting) A pre-sentence investigation has been made. It is before me now and I have read it. (A. 7)

The trial court then recited the Petitioner's past conflicts with the law as reflected in the pre-sentence report and without hearing further from the defendant or the defense, sentenced the petitioner to twenty-five years imprisonment.

ARGUMENT

BRIEF SUMMARY

In the pertinent part of his Petition for Certiorari the Petitioner urged that there was a conflict between the Seventh Circuit and the Sixth Circuit on the question of whether prejudice or non-prejudice is to be presumed on appeal where it appears that a judge has read a pre-sentence report before conviction or plea. The petitioner further urged that this Court should exercise its supervisory powers to prohibit all pre-sentence investigations prior to conviction or plea in the absence of an intelligent consent thereto by the defendant because such investigations work substantial damage upon the reputation of an accused who might subsequently be acquitted and because investigations conducted under such circumstances can do substantial and unjust harm to a guilty accused at his sentencing. This Court granted certiorari limited to the "questions" plural raised in the case with respect to Rule 32(c)(1) of the Federal Rules of Criminal Procedure. Accordingly this argument is in three parts which can be summarized as follows:

1. In its order affirming the Petitioner's conviction the Sixth Circuit invoked, without quoting, the authority of *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916 in holding that the burden of proof was on the appellant therein and Petitioner herein to show that prejudice resulted from the trial court's reading of his pre-sentence report prior to conviction. On Petition for Rehearing the Petitioner demonstrated that the *Calland* holding was that the burden was on the appellee to show

non-prejudice in such instances and that Calland's conviction was affirmed only because that burden had been met. In spite of this presentation a rehearing was not granted. It is urged herein that this conflict between the circuits should be resolved in favor of the Seventh Circuit's position because it would be impossible for an appellant to make an affirmative showing of prejudice under the circumstances herein (and under almost all circumstances) because such a showing could be made only through a demeaning interrogation of the trial court which a convicted defendant would have no right to undertake. Placing the burden on the appellant where Rule 32(c)(1) is violated would emasculate the rule.

2. The literature in the field of federal probation investigation establishes conclusively that the most important part of a properly conducted pre-sentence investigation is the interview of the subject and the attitutde expressed by him. Judges at judicial conferences which have been reported in the Federal Rules Decisions have confirmed the importance of this phase of the investigation to the determining of the sentence to be meted out. Where there is no consent to a pre-conviction pre-sentence investigation there necessarily is no interview of the accused and the investigation necessarily is an incompetent one. Where an investigation is conducted without an intelligent consent by an accused before the accused has been subject to the therapeutic effect of an extensive conference with his counsel, proceedings in court and the passage of time after his arrest, he is likely to demonstrate such belligerence or such a propensity to rationalize in the course of his interview as to cause him great harm at the time of sentencing because of mistaken comparisons which will be made between him and similar defendants whose pre-sentence investigations are conducted under proper conditions. It is urged herein that this Court should exercise its supervisory powers to require that pre-sentence investigations not be submitted to or considered by a sentencing court where conducted prior to conviction without consent of counsel as well as the accused.

3. The literature in the field of federal probation investigation further establishes that pre-sentence investigations necessarily must include interviews of the past and present social, religious, educational and employment contacts of the defendant. Where such an inquiry is launched prematurely and without consent great damage will be done to an accused who might ultimately be found innocent and who is presumably innocent at the time of such inquiry.

* * *

The relief being prayed for is that of a new trial with instructions that if Petitioner be convicted at his new trial any pre-sentence report submitted is to be based only upon information obtained independently of Petitioner's old pre-sentence report in an investigation conducted subsequent to such conviction.

I

Prejudice Should Be Presumed Where It Appears That the Express Provisions of Rule 32(c)(1) Have Been Violated Because To Do Otherwise Would Emasculate the Rule

The order by the Sixth Circuit affirming Petitioner's conviction reads as follows in pertinent part:

> There is no basis for inferring prejudice from the fact that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916. (A. 8)

The above-quoted ruling cannot be construed as anything but a holding that the absence of prejudice will be presumed on appeal where it merely appears that the trial judge read the pre-sentence report prior to conviction with no further showing. The Seventh Circuit ruled directly to the contrary in the *Calland* case which the Sixth Circuit cited:

> We hold that the facts in the record before us effectually rebut the presumption of prejudice arising from the apparent violation of Rule 32(c)(1).
>
> *Calland v. United States*, 371 F.2d 295, 296 (7th Cir. 1966)

Justice Clark, late of this Court, also took the position that such a violation creates a presumption of prejudice. On a set of different but not distinguishing facts he ruled as follows in a concurring opinion to a reversal which was rendered by the majority on other grounds:

> In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc. 32(c)(1) it was conducted prior to the plea. For these reasons I would reverse the judgment with instructions that Smith be allowed to withdraw his guilty plea and stand trial on the information.
>
> *Smith v. United States*, 360 U.S. 1, 11, 18, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959)

If the position taken by the Seventh Circuit and by Justice Clark is upheld by this Court the Petitioner's conviction necessarily must be reversed.

The Petitioner was convicted in an area of the country where the District Court criminal dockets are heavily laden with bootleg cases and this circumstance has caused the Judges of these courts to develop a strong distaste for the requirements of Rule 32(c)(1) as was expressed at one reported judicial conference.

> Some of the participating judges would go further and would repeal that portion of Rule 32(c) that prohibits the judge from reading the pre-sentence report prior to conviction. In brief, their position is that it would enable the judge to be prepared to sentence immediately upon conviction. If the judge, in rural areas, has to study long pre-sentence reports after conviction he may either have to read them hurriedly or postpone sentencing until his next visit

> with the consequence that the defendant may be in a marginal jail during the interim. The risk of prejudice to the defendant is minimal since the vast majority of cases involve ample fact and law issues, like alcohol tax cases, and most defendants plead guilty. It was suggested that the matter be referred to the Advisory Committee on Federal Rules of Criminal Procedure for such action as that committee deems appropriate.
>
> *Seminar & Institute on Disparity of Sentences*, 30 F.R.D. 401, 442 (1961).

What might be appropriate to bootlegging cases can hardly be appropriate to a case which calls upon the sentencing judge to impose either a twenty five year executed sentence or probation with no intermediate alternative and there are numerous other types of federal criminal cases where, as in this case, the trial and sentencing constitutes a very serious matter.

To uphold the decision of the Sixth Circuit in this case would be the equivalent of adopting the recommendation made at the Seminar & Institute on Disparity of Sentences which is quoted above. To impose a presumption of non-prejudice where a violation of Rule 32(c)(1) appears would be to impose an irrebutable presumption because, as a practical matter, the only method of making an affirmative showing of prejudice would be for the defense to undertake a demeaning interrogation of the trial court and to obtain full disclosure of the contents of the pre-sentence report. There are firm and long-standing policies which militate against both types of undertaking.

In its Memorandum in Opposition to the Petitioner's Petition for Certiorari the United States inserted a footnote saying that "At all events, there is no occasion to direct a new trial. Although we believe that such a hearing is not warranted here, petitioner's claim, at most, suggests a remand to the district court for inquiry into the precise factual circumstances of the reading and the question of

possible prejudice." This suggestion by the United States is not feasible for the reasons given above. There would be no opportunity for "inquiry into the precise factual circumstances of the reading" because substantial portions of what was read probably could not be disclosed and because there is no feasible procedure by which the defense could inquire into the acts and mental processes of a trial judge which occurred on or before May 31, 1967.

Counsel for the Petitioner also have noted that the United States has specially designated the entry showing the filing of a pre-trial mental exam to be shown in the single appendix. This suggests that the United States will seek to urge that there could have been no prejudice to the Petitioner as a practical matter because the trial court was required by the Petitioner's motion for a mental test to read a report of a type which typically contains more prejudicial material than the average pre-sentence report. Such an approach by the United States evidences a misunderstanding of what the Seventh Circuit meant by "prejudice" and overcoming the presumption of same. In the *Calland* case there was no deliberate violation of the rule as the pre-sentence report therein had been prepared and submitted to the trial court as the result of an earlier conviction of Calland and so there was no prejudice to the policies which Rule 32(*c*)(1) is intended to implement. The value and validity of pre-sentence reports would be greatly diminished if there were no assurance to those persons interviewed that there will be no disclosure of their statement to the accused if such disclosure would be against their interests and that there will be no disclosure to anyone outside of the probation office if the accused is never convicted. The preservation of the pre-sentence report as a useful institution can be achieved only by the implementing of Rule 32(*c*)(1) and that rule can be implemented and enforced only by the reversal of causes in which a deliberate violation occurs.

For the reasons given above it is respectfully submitted that the order of the United States Court of Appeals for

the Sixth Circuit affirming Petitioner's conviction should be reversed and this cause should be remanded with instructions to grant Petitioner a new trial.

II

A Presentence Investigation Conducted Before Conviction Without Consent or Without Intelligent Consent Is Inevitably Prejudicial to the Guilty Accused

No detailed information appears to be available showing the present extent of the practice among the districts of conducting pre-sentence investigations prior to conviction or the extent to which such districts engage in the practice without the consent of the accused. The Seminar & Institute on Disparity of Sentences, however, did disclose that at least 30 districts were authorizing such premature investigations as of 1961 and that some of them were permitting such investigations without the consent of the accused.

> *Preparation and Use of the Pre-sentence Investigation Report Prior to Conviction.* About thirty federal district courts currently permit the probation office to begin the pre-sentence investigation prior to conviction. In some of these districts this is done only if the defendant expressly waives any objection to preparing the pre-sentence report prior to conviction. Some federal district courts prohibit the practice entirely on the ground that it is contrary to the rights of the defendant, particularly if the pre-sentence report is read by the judge prior to conviction. A majority of those who discussed the question seemed to agree that the preparation of the report prior to conviction would in general be beneficial even to the defendant, since it would reduce his time in jail after conviction while awaiting his sentence. Under present Rule 32(c) of the Rules of Criminal Procedure, 18 U.S.C.A., the report cannot be disclosed to the judge and this adequately safeguards the defendant against possible prejudice. Therefore the consensus seemed to be that the early preparation of the pre-sentence report

with the consent of the defendant, is a desirable practice to follow in those districts where it will appreciably reduce the time spent in jail awaiting sentence.*

Seminar & Institute on Disparity of Sentences, 30 F.R.D. 401, 442 (1961)

In those districts where the probation service does obtain the consent of an accused before conducting a pre-sentence investigation prior to a verdict, finding or plea of guilty, the consent form used generally reads as follows:

> Defendant's Approval To Institute a Pre-sentence Investigation Before Conviction or Plea of Guilty
>
> I, name of defendant, hereby consent to a pre-sentence investigation by the probation offices of the United States District Courts. This investigation is for the purpose of obtaining information useful to the court in the event I should hereafter plead or be found guilty. By this consent I do not admit any guilt or waive any rights and I understand that any report prepared will not be shown to the court or anyone else until after conviction or plea of guilty.
>
> *Probation Form No. 13*

What this consent form in no way discloses or suggests to the accused is that the most important phase of the pre-sentence investigation and possibly the most important phase of the entire proceeding is to take place immediately after the execution of the form, i.e. the pre-sentence investigation interview of the accused.

---

*The validity of the arguments made in this quote in favor of pre-arraignment pre-sentence investigations have, for the most part, been cancelled out by the subsequently enacted bail reform act and by the subsequently enacted act providing for credit for jail-time served prior to sentencing. The said arguments have a present validity only with respect to juveniles who, generally, are not bondable and whose pre-commitment housing very often is such as to militate against the likelihood of their subsequent rehabilitation.

A prime responsibility of the probation officer in adult investigation work is the preparation of a good pre-sentence report for the courts. The chief tool-in-trade used in accomplishing this is the personal interview with the defendant.

The Initial Interview with the Offender, Seymour I. Halleck, M.D. – Fed. Prob., March 1961, p. 23, 25.

Of course the most important step in the investigating process is that first interview with the defendant, and if you handle it skillfully you not only have the basis for a truly competent report, but you also have gone a long way toward launching the treatment job that must develop later.

The Probation Officer Investigates, Paul W. Keye, University of Minnesota Press, 1960, p. 21.

A good probation report should contain a discussion and evaluation of the subjective aspects of the offense including the offender's attitudes, values and orientations toward his offenses, his community, and authority in general.

Seminar & Institute on Disparity of Sentences, 30 F.R.D. 401, 441

The pre-sentence interview has a very substantial effect upon the opinion which is formed by the pre-sentence investigator and this impression has a very substantial effect upon the opinion finally reached by the Court as to whether the accused, upon his conviction, should be let to probation. But even in those districts where consent is obtained before the conducting of a pre-sentence prior to arraignment the accused is not advised that he should not consent unless he has, with the advice of counsel, reconciled himself to a conviction and intends to plead guilty. In the absence of such a mental reconciliation the accused is likely to earn the disapproval of the probation officer if that officer follows the dictates of the official publication on Pre-Sentence Reports which is provided by the Administrative Office of the United States Courts:

> The attitude of the defendant toward his offense is significant in determining whether he should be considered for probation. It must be kept in mind that some defendants may attempt to rationalize or justify their crime or even place the blame on someone else.
>
> *The Presentence Investigation Report*, Publication No. 103, Division of Probation, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C., Feb. 1955, p. 11.

The opinion which the probation officer forms with respect to the individual accused is, in turn, very influential upon the trial judge who will pronounce the sentence:

> Judges agree that mathematically identical sentences for the same offense are improper, unfair, and in themselves disparate. . . . What information is necessary to an informed decision? To state it simply, we must know the facts, and we must know the men. What are the sources from which we may obtain such necessary information? First and foremost, of course, is the pre-sentence investigation report of the Probation Officer.
>
> *Sentencing Institute-Fifth Circuit*, (1961) 30 F.R.D. 185; 282, Hon. Joe Estes, C.J., D.C.N.D. Tex.
>
> I have leaned heavily upon all pre-sentence investigative reports which I have received while on the federal bench and know that they have aided me greatly in giving just and proper attention to each case. The subject's statements to the probation officer are useful in determining the defendant's version of the facts and his general social attitudes.
>
> 21 Fed. Prob. 2:17, Je, 1957, Casper Platt, J.

Typically, in districts where pre-sentence reports are compiled prior to arraignment but only after the consent of the accused has been obtained, the interview with the accused takes place immediately after his arraignment before the Commissioner.

> The United States Commissioners in each division were then contacted. Each agreed to explain the consent form (Form No. 13) to the defendant and to give him an opportunity to sign it at the time he appeared at the commissioner's hearing. The commissioners agreed to mail the signed consent to the probation office.
>
> *Pre-Arraignment Investigations:* A Partial Solution to the Time Problem. Leon J. Sims, U.S. Prob. Off., Northern Dist. of Georgia, Fed. Prob. Vol. 28, No. 1, p. 24, 25 (1964)

Thus the accused is interviewed shortly after his arrest when his feelings of hostility will normally be at their peak and before he has had the therapeutic effect of a detailed conference with his attorney, time to reflect upon the matter and the opportunity to be present at his pre-trial proceedings in the District Court and to observe the system of justice working in his and in other cases. When an accused is first arrested and brought before a Commissioner, and this is particularly true in the case of a first offender, he usually is fearful and lonely and very willing to talk to someone at length and the opportunity to talk to a probation officer in confidence offers a welcome release. But at this early stage of the proceedings an accused who is not "jail-wise" will be far more likely to rationalize and attempt to justify his conduct and unwittingly condemn himself to an undeserved executed sentence.

To a substantial extent the Administrative Office of the United States Courts has encouraged the practice herein complained of by providing the most cursory type of consent form that conceivably could be drafted, by leaving the importance of obtaining the advice of counsel out of the form and by suggesting that the probation officer do this verbally and by indicating that the consent of the accused is merely desirable and not mandatory:

> Where a court is not continuously in session and the judge sits for only short periods in the various places of holding court a probation officer may find it difficult to complete the pre-sentence reports

within the limited time available. In these circumstances some courts request that investigations be conducted prior to conviction or plea. When such a request is made, the probation officer should ask the defendant after having advised him of his right to the advice of counsel, to sign the Probation Division's form authorizing the probation officer to institute the investigation. It is also desirable to have on file a letter from the defense attorney stating that he has no objection to the probation officer beginning the investigation prior to conviction or plea.

As provided by rule 32(c)(1) of the Federal Rules of Criminal Procedure, the pre-sentence investigation report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

The Presentence Investigation Report, Publication No. 103, Division of Probation, Administrative Office of the United States Court, Supreme Court Building, Washington, D.C. 20544, February, 1965, p. 4

While there can be no question that a pre-arraignment pre-sentence investigation often is beneficial to all parties concerned, particularly where the accused is in custody and is totally reconciled to conviction and punishment and desirous of shortening his period of jail-type custody it is nonetheless an inescapable fact that such early pre-sentence investigations constitute an unconscionably shoddy practice where the investigation is undertaken without consent or without a well-advised consent.

For the reasons given it is respectfully submitted that the prayed for remand and reversal of this cause should include a mandate to the effect that if the Petitioner should be convicted upon a new trial, no prior extra-judicial presentations to the trial court should be considered at the sentencing and, if a pre-sentence investigation should appear to be in order in view of that circumstance, that the said

investigation be conducted independently of the prior investigation.

It is further respectfully recommended that this Court should exercise its supervisory powers and direct the Administrative Office of the United States Courts to amend its above-quoted Form 13 to include a sufficient advisement and to amend its handbook to make the use of that form an absolute requirement.

III

Where a Presentence Investigation Is Initiated Before Conviction and Without the Consent of the Accused a Substantial Punishment Is Inflicted upon the Accused Without Legal Process

When a pre-sentence investigation is initiated the subject of the investigation becomes a topic of discussion between the investigators and the subject's past employers, school officials, pastors, business associates, neighbors, relatives and creditors. The following is a list of the areas of inquiry recommended in a recent issue of Federal Probation:

- Offense
  - Official version
  - Statement of Codefendants
  - Statement of witness, complainants and victims
- Defendant's version of offense
- Prior Record
- Family History
  - Defendant
  - Parents and Siblings
- Marital History
- Home and Neighborhood
- Education
- Religion
- Interests and leisure-time activities

Health
Physical
Mental and Emotional
Employment
Military Service
Financial Condition
Assets
Financial Obligations
Evaluative Summary
Recommendation.

It Is Respectfully Recommended, Fed. Prob., June, 1966, pp. 38, 39

If conducted as recommended by the literature in the field a pre-sentence investigation includes contacts with individuals known to the accused and whose opinion of the accused will be important and of value to the accused in his future life. Where a pre-sentence investigation is conducted prior to a verdict, finding or plea of guilty these important contacts of the accused necessarily are informed that a "presentence investigation" or "probation report" of him is being conducted and the unavoidable impression will be that the accused has been convicted of a crime. Certain of these contacts necessarily will have a very detrimental effect upon the reputation of the accused who has yet to be found guilty.

> A wide variation in practice is noted in verification of school records. . . . All except four offices, however, indicate some practice of verifying school records.
>
> * * *
>
> Since employment history is considered one of the most reliable indexes for the prediction of success or failure on probation or parole, federal offices routinely verify both past (in 83 offices) and present (in 89 offices) employment.

Presentence Investigation Practices in the Federal Probation System, Federal Probation, Sept. 1958, pp. 27, 28, 29.

> Religious affiliations are always a good source of information and help, not only for the investigation but for implementation of probation plans. Clergymen can be of great assistance in pointing out a client's strengths and outlining elements of a client's personality upon which you propose to build a probation program. Clergymen and lay members of a church may be of invaluable assistance in planning a work program.
>
> *Court Investigations and Reports,* Lawrence M. Stump, Federal Probation, June, 1957, pp. 9, 14.

When such investigations are made without consent, every defendant who eventually is found not guilty or is otherwise vindicated has suffered the irreparable harm and punishment of humiliating contacts with persons and offices whose opinions of him and entries relating to him are of substantial importance and value to him.

* * *

Thus there has been prejudice to the Petitioner by reason of the presumption that must attend the fact of record that the Petitioner's pre-sentence examination was submitted to and read by the trial court prior to Petitioner's conviction and there has been prejudice to the policies which Rule 32(c)(1) of the Federal Rules of Criminal Procedure is designed to implement. Accordingly, Petitioner prays for a reversal of this cause and that:

1. The mandate of this Court issue directing that Petitioner be granted a new trial.

2. That it further be directed that no pre-sentence investigation be conducted without Petitioner's consent unless and until Petitioner is convicted.

3. That it further be directed that if Petitioner should be convicted on the charge herein the presentence investigation heretofore made in this case shall be disregarded at the sentencing of Petitioner.

4. That it further be directed that if Petitioner should be convicted and if it should be deemed desirable to have

a pre-sentence investigation that the probation officer is to be directed by the trial court to conduct the investigation independently of the earlier pre-sentence report and to borrow no materials from the said report in completing said investigation.

Respectfully submitted,

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